90

(1)

Supreme Court, U.S.
FILED
071298 APR 14 2008
OFFICE OF THE CLERK

No. __-___

IN THE

United States Supreme Court

In the Matter of the Application of

JAMES A. PRENDERGAST,

Petitioner,

v.

THE CITY OF NEW YORK; THE CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION, and VERNA EGGLESTON, Administrator/Commissioner of the City of New York Human Resources Administration,

Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

LAW OFFICES OF
ROBERT DAVID GOODSTEIN, ESQ.
Attorneys for Petitioner
56 Harrison Street, Suite 401
New Rochelle, New York 10801
914-632-8382

QUESTIONS PRESENTED

1. Pursuant to the Due Process Clause under the Fourteenth Amendment to the United States Constitution was not Petitioner, a tenured civil servant with a property right in his position, entitled to be offered a due process hearing on the issue of whether he was domiciled in the City of New York?

2. Can Respondents draw a negative inference that Petitioner did not maintain a New York City domicile merely based upon Petitioner's refusal to permit a warrantless search of his residence?

PARTIES TO PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

3. The Petitioner, who was the Appellant below, is James A. Prendergast. The Respondents, who were Respondents below, are The City of New York, The City of New York Human Resources Administration, and Verna Eggleston, The Administrator/ Commissioner of The City of New York Human Resources Administration at the time the events occurred.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT.	ii
TABLES OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	12

TABLE OF AUTHORITIES

Page

Federal Cases

Marshall v. Wait,
628 F.2d 1255 (9th Cir. 1980) 8

McLaughlin v. Kings Island Division of Taft Broadcasting Co.,
849 F.2d 990 (6th Cir. 1988)..... 8

Michigan v. Tyler, Mich, 436 U.S. 499,
98 S. Ct. 1942 (1978) 8

Whren v. U.S., 517 U.S. 806,
116 S. Ct. 1769 (1996)..... 8

State Cases

Matter of Felix v. New York City Department of City Wide Administrative Services,
3 N.Y. 3d 498, 788 N.Y.S.2d 631 (2004).. 6,7,8

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the New York State Court of Appeals denying Petitioner's motion for leave to appeal to the New York State Court of Appeals is reported at 9 NY 3d 818; 881 N.E 2d 1201; 852 N.Y.S. 2d 14 (Table) The Decision of the Appellate Division 1st Dept. is reported at 44 A.D. 3d 414; 843 N.Y.S. 2d 256 (2007) and is reprinted in the Appendix. The Decision and Order of the New York State Supreme Court Justice, Marilyn G. Diamond is reprinted in the Appendix.

JURISDICTION

The New York State Court of Appeals entered its Judgment on January 15, 2008. This Court has jurisdiction under 28 USC § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Fourth Amendment to the Unites States Constitution, and 42 USC § 1983.

STATEMENT OF THE CASE

Petitioner, James Prendergast, was a Permanent Tenured New York City Civil Servant. Pursuant to

§ 12-120 of the New York City Administrative Code, Petitioner was required to maintain his domicile within The City of New York.

In July 2005, Petitioner was summoned to Respondents' office where Petitioner was told to produce evidence that he was not living outside the City of New York. Petitioner supplied a myriad of documentation covering the then current and preceding three years to prove that Petitioner was, indeed, living within the City of New York. Petitioner's documents included the following:

1. Petitioner's Voter Identification Card showing a New York City residence.
2. Petitioner's Jury Summons showing a New York City residence, dated November 8, 2002.
3. Petitioner's Jury Summons showing a New York City residence, dated October 24, 2003.
4. Petitioner's Jury Duty Certification showing his New York City residence, dated October 28, 2003.
5. Letter to Petitioner from Dell Financial Services showing a New York City residence, dated November 13, 2001.
6. Petitioner's Fleet Bank statement, dated December 2002, showing a New York City residence.

7. Petitioner's Fleet Bank Statement dated, May 2004, showing a New York City residence.

8. Petitioner's Chase Bank credit card statement, dated May 16, 2004, showing a New York City residence.

9. Petitioner's Verizon telephone bill, dated May 2004, showing a New York City residence.

10. Queens County Savings Bank statement, dated July 25, 2004, showing a New York City residence.

11. Appliance Contract, dated August 25, 2004, showing a New York City residence.

12. Con Edison billing summary, dated September 12, 2004, for Petitioner's New York City residence.

13. Queens County Savings Bank statement, dated September 26, 2004, showing a New York City residence.

14. Time Warner cable bill, dated October 21, 2004, showing Petitioner's New York City residence.

15. Visa credit card bill, dated October 21, 2004, showing a New York City residence.

16. Statement from Freemont Investment and Loan Mortgage, dated December 2004, showing a New York City residence.

17. Prudential Statement of Account, dated December 31, 2004, showing a New York City residence.

18. Petitioner's 2004 Tax Returns showing a New York City residence.

19. Queens County Savings Bank statement, dated March 25, 2005, showing a New York City residence.

20. Time Warner cable bill, dated April 2005, showing a New York City residence.

21. Petitioner's New York State Motor Vehicle Insurance Card for the period May 17, 2005 through October 17, 2005, establishing a New York City residence.

22. Credit card statement, dated May 20, 2005, showing a New York City residence.

23. Queens County Savings Bank statement, dated May 25, 2005, showing a New York City residence.

24. Verizon telephone bill, dated June 1, 2005, showing a New York City residence.

25. Credit card statement, dated June 3, 2005, showing a New York City residence.

26. Con Edison bill, dated June 13, 2005, showing a New York City residence.

27. Cablevision bill, dated June 11, 2005, showing a New York City residence; and

28. Petitioner's New York State Driver's License, showing his New York City residence.

This plethora of documents, which included utility bills for Plaintiff's New York City residence and covered a period of over four years, was presented to the Agency-employer. However, this proof was *not* considered because a Due Process Hearing was *not* held.

It is not disputed that Respondents at bar *never* offered Petitioner a Due Process Hearing or gave him notice of his right to demand a hearing. Instead, the Courts below wrongfully placed the burden upon Petitioner, claiming he waived his right to an adverse Due Process Hearing by failing to demand it.

Finally, the employer drew a negative inference that Petitioner did *not* maintain a domicile within the City of New York merely because Petitioner refused to allow Respondents access to his residence for a warrantless search. The Courts below sanctioned the drawing of this negative inference and utilized it as a basis for concluding Petitioner did *not* maintain a New York City domicile.

REASONS FOR GRANTING THE PETITION

On January 15, 2008, New York's highest State Court, the Court of Appeals, denied Petitioner's motion for leave to appeal. Thus, the Decision of the intermediate Appeals Court, the Supreme Court, Appellate Division, First Department, is

binding upon the parties if this Court denies the subject Petition.

In affirming the Trial Court's Order, the Appellate Division, *as a matter of law*, held that Respondents' decision dismissing Petitioner from Petitioner's tenured permanent Civil Service position had a rationale basis and did not require a due process hearing, pursuant to the Fourteenth Amendment to the United States Constitution.

The New York City Human Resources Administration, affirmed by the Court below, concluded that Petitioner was ineligible to maintain his civil service position because Petitioner failed to maintain residency within The City of New York.

Section § 12-120 of The New York City Administrative Code states:

> Except as otherwise provided in section 12-121, any person who enters city service on or after September first nineteen hundred eighty-six (i) shall be a resident of the city on the date that he or she enters city service or shall establish city residence within ninety days after such date and (ii) shall thereafter maintain city residence as a condition of employment. Failure to establish or maintain city residence as required by this section shall constitute a forfeiture of employment; provided, however, that prior to dismissal for failure to establish or maintain city residence an employee shall be given notice of and the opportunity to con-

> test the charge that his or her residence is outside the city.

The term "residence" as used in § 12-120 is defined in § 12-119 of the Administrative Code.

> As used in sections 12-120 and 12-121 of this subchapter:
>
> a. The word "residence" means domicile and the word "residence" means *domiciliary*
>
> b. The term "city service" means service as an employee of the city or of any agency thereof other than service in a position which is exempted from municipal residence requirements pursuant to the public officers law or any other state law.(emphasis added)

Thus, to fulfill the mandate of § 12-120, an employee of The City of New York must maintain his "domicile" within the City.

Further, Petitioner-Appellant was entitled to a full adversarial hearing.

I

The leading precedent on the interpretation of § 12-120 and the due process requirement for a hearing before a public employee can be declared ineligible from a permanent civil service position is *Matter of Felix v. New York City Department of City Wide Administrative Services,* 3 NY3d 498, 788 NYS2d 631 (2004). In *Felix* the Court found that, pursuant to Administrative Code § 12-120, "failure

to maintain residence renders an individual ineligible for continued municipal employment under The New York City Administrative Code". *Id* at 505.

Further, the Court of Appeals ruled that to satisfy constitutional due process it is sufficient that the employee be given notice of and the opportunity to contest the allegation that he or she does not live within The City of New York. The Court of Appeals concluded that to satisfy constitutional due process *Felix* was required and/or requested to produce various documents, *e.g.* tax documents, a driver's license and a voter registration card, in order to establish a New York City residence. "Documents such as these need not be subjected to the adversarial testing of a hearing in order for the municipality to determine whether a municipal employee has established that he or she resides in New York City. The municipality need only review each document to make that determination." *Id* at 506.

In the case at bar, during both the first and second investigations, Mr. Prendergast also supplied the required documentation. Each and every required document submitted by Mr. Prendergast predated the June 2, 2005 Notice of Investigation of Residency and clearly established Mr. Prendergast's "domicile" within The City of New York. Therefore, the documents submitted in this case support that Mr. Prendergast was domiciled within The City of New York. Accordingly, as per *Felix*, these documents need not be tested in an adversarial hearing in order for the City of New York to

have established and confirmed that Mr. Prendergast was, indeed, a resident of New York City.

However, Respondents' Determination, confirmed when Justice Diamond and the Appellate Division dismissed the Petition, was not founded upon the myriad of required and reliable documents, but was instead generated by statements elicited from Petitioner's estranged wife's neighbors. Contrary to any erroneous assumptions, *Felix* does not and cannot stand for the proposition that "credibility determinations", as made in this case both by the Human Resources Administration and by Justice Diamond, can be generated without an adversarial hearing. If the plethora of reliable documents are to be attacked because of uncorroborated statements made by busy body neighbor's claims, a hearing is required. Furthermore, speculation as to Mr. Prendergast's marital status, his relationship with his children, and his occasionally spending the night with his kids in their home in Nassau County, are all uniquely proper subjects for an adversarial hearing.

Justice Diamond and the Appellate Division Court overlooked Petitioner's due process right to an adversarial hearing when the Court adopted the untested credibility findings of the investigator and stated "after reviewing the findings of the investigation, interviewing petitioner and reviewing the documents submitted on his behalf, Ms. McNish concluded that petitioner had failed to establish he was a bonafide New York City resident. *In support of her conclusion, Ms. McNish*

found that the statements given by the Nassau County neighbors indicating that petitioner apparently lived exclusively at the Nassau County house were more credible than the statement given by the petitioner's tenant at the 86th Road property since the neighbors had no incentive to fabricate a story whereas the tenant may have been directed by petitioner, as a condition of the tenancy, to tell anyone who ask the petitioner lived there." (Emphasis added)

Absent any precedent to the contrary, in order to satisfy Petitioner's due process right, this credibility determination, *based on pure speculation*, was required to be tested at an adversarial hearing. As Mr. Prendergast was never offered an adversarial hearing on the issues of credibility, the Petition should be granted.

II

Further, the interpretation of the Court of Appeals Decision in the *Matter of Felix v. New York City Department of City Wide Administrative Services,* 3 NY3d 498 (2004) regarding the City's obligation to offer a due process hearing has never been considered by this Court. Since there is a conflict between the documentary proof and some of witnesses statements, it was necessary for Respondents to offer Petitioner a Constitutional due process hearing. The importance of these issues regarding all New York City employees renders it

proper for consideration by the United States Supreme Court.

III

The intermediate Appellate Court below erroneously permitted the employer to infer that Petitioner did not live in New York City based upon Petitioner's refusal to allow a warrantless search of his residence. Administrative searches are encompassed by the Fourth Amendment to the United State Constitution *Michigan v. Tyler, Mich* 436 U.S. 499, 98 S. Ct. 1942 (1978). An "administrative inspection" is permitted *only* of commercial property and only as part of enforcing a persuasive regulatory scheme. *Whren v. U.S.*, 517 U.S. 806 116 S. Ct. 1769 (1996). In the case at bar, the demand to search Petitioner's residence cannot be demanded as an "administrative inspection" as it involved residential rather than commercial property, and it was not part of a regulatory scheme. Becoming a New York City permanent civil service employee does not put the individual on notice of the likelihood of an unannounced warrantless inspection. A city employee retains a reasonable expectation of privacy at his residence. See *Marshall v. Wait*, 628 F. 2d 1255 (9th Cir. 1980).

By asserting his Fourth Amendment right, Petitioner may *not* be threatened with a penalty. *McLaughlin v. Kings Island Div. of Taft Broadcasting Co.*, 849 F. 2d 990 (6th Cir. 1988). The employer's negative inference, drawn from Petitioner's

refusal to permit the warrantless search, is an improper penalty. The Courts below should *not* have sanctioned this negative inference.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: New Rochelle, New York
April 9, 2008

Respectfully Submitted,

Law Offices of
ROBERT DAVID GOODSTEIN, ESQ.

By _____
Robert David Goodstein, Esq.
Counsel of Record
56 Harrison Street, Suite 401
New Rochelle, New York 10801
914-632-8382

APPENDIX

TABLE OF APPENDICES

Page

Appendix A
Order dated January 15, 2008 ..... 1a

Appendix B
Opinion No. 07 519
dated October 11, 2007..... 2a

Appendix C
Decision and Order
dated June 29, 2006 ..... 5a

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany, on the fifteenth day of January 2008.

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 1323

In the Matter of
JAMES A. PRENDERGAST,

Appellant,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

APPENDIX B

SUPREME COURT
OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

2007 NY Slip Op. 07519
October 11, 2007

In re
JAMES A. PRENDERGAST,
Petitioner-Appellant,

v.

THE CITY OF NEW YORK, *et al.*,
Respondents-Respondents.

GOODSTEIN & WEST, New Rochelle (Robert David Goodstein, of counsel), *for Appellant.*

MICHAEL A. CARDOZO, Corporation Counsel, New York (Deborah A. Brenner, of counsel), *for Respondents.*

ANDRIAS, J.P., FRIEDMAN, WILLIAMS, SWEENY, *JJ*:

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 30, 2006, which denied a petition seeking to annul the determination of respondent Human Resources Administration (HRA) that had terminated petitioner's employment for failing to maintain residency within the City of New York, as required by Administrative Code § 12-120, unanimously affirmed, without costs.

The HRA determination was not arbitrary or capricious, nor was it irrational, or an abuse of discretion. Petitioner's documentary evidence did not show that he resided in Queens, but merely that he received much of his mail at a post office box in that borough after learning of the investigation into his residency. His explanation for receiving mail at the post office box address was demonstrably false. Petitioner's wife, to whom he remained married despite asserting that they had been separated for some 10 years, owned a home with petitioner (purchased together at the time they allegedly separated), at which he was seen spending the night on most of the occasions when he was under surveillance. He was never seen residing at the Queens home. Petitioner also refused to allow the investigators to come to his Queens home to prove that he had access to that residence, which was occupied by another individual. Under these circumstances, the HRA determination that petitioner did not reside at the Queens residence had a rational basis.

Petitioner asserts denial of due process because he was not afforded a full adversarial hearing. This point was never raised at the administrative level, or, for that matter, in Supreme Court, and is thus unpreserved for review by this Court (*Green v. New York City Police Dept.*, 34 AD3d 262 [2006]).

APPENDIX C

SUPREME COURT
OF THE
STATE OF NEW YORK
NEW YORK COUNTY

PART 48

Index No. 100082/06
Motion Date _____
Motion Seq. No. 001
Motion Cal. No. _____
Received June 29, 2006
Filed June 30, 2006

PRESENT: HON. MARYLIN G. DIAMOND
Justice.

Matter of
JAMES PRENDERGAST,

Petitioner,

For a Judgment Under Article 78 of the
Civil Practice Law and Rules,

against

THE CITY OF NEW YORK, et al.,

Respondents.

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that: In this CPLR article 78 proceeding, petitioner, a former employee of the respondent New York City Human Resources Administration ("HRA"), challenges an administrative determination discharging him for failure to comply with the requirement that he reside in the City of New York. Petitioner contends that he provided adequate documentation of his New York City residency and that the respondents' finding to the contrary was arbitrary and capricious, irrational and an abuse of discretion.

Background

Petitioner was hired by HRA as a Fraud Investigator in December, 1986. As a condition of employment, petitioner was required, under section 12-120 of the Administrative Code of the City of New York, to reside in the City of New York. In May, 2004, HRA received information which suggested that petitioner was in violation of the residency requirement. HRA then conducted an investigation which led to the issuance of a report on May 5, 2005.

The report noted that petitioner and his wife own a house in Nassau County and two houses in Bellerose, New York, one on 86th Road and the other on 89th Avenue. It also noted that petitioner claims that he resides at the 86th Road address but that he uses a Bellerose post office box as the address on his New York State driver's license and on the registration of a Buick automobile which he owns. His wife is listed as the owner of a Ford mini-

van and a Toyota minivan, both of which are registered at the Nassau County address.

According to the report, on or about June 7, 2004, HRA investigators met with an individual who identified himself as a tenant of the ground floor apartment of the 86th Road Bellerose property. The tenant stated that the petitioner resided in the upstairs apartment without his wife and children. However, investigators also spoke with neighbors who lived near the Nassau County property who stated that the Prendergast family had resided at that house for approximately 12 years and that Mr. Prende[r]gast was present with such frequency that they assumed it was his exclusive residence.

As part of the investigation, HRA also conducted surveillance of petitioner at the Bellerose and Nassau residences on nine randomly selected dates between October, 2004 and April, 2005. On six of those occasions, petitioner was observed leaving the Nassau County residence between the hours of 7:00 a.m. and 8:55 a.m. On one occasion, petitioner was observed leaving the Nassau County property in his wife's Ford minivan, driving to the 86th Road property, parking the van across the street and departing for work in his Buick, which was located in the same position as it was observed the previous night.

As a result of the investigation and report, petitioner was advised that he might be in violation of the residency requirement and was given an opportunity to demonstrate that, in fact, he resided in New York City. In response, petitioner's attorney submitted various documents to a staff attorney

with HRA, Robyn McNish, who found the documents to be insufficient and requested that petitioner submit phone records, signed copies of tax returns and any other documentation which would establish that petitioner resided in New York City. The petitioner requested an opportunity to present the requested documentation in person. On July 22, 2005, accompanied by his attorney, petitioner was interviewed by Ms. McNish. At the interview petitioner stated that he and his wife had separated either before or around the time of their purchase of the Nassau County property in 1995. Petitioner claimed that he frequently visited the Nassau County property in the evenings and weekends in order to spend time with his children and that he sometimes spends the night there. He also claimed that he used a post office box for sensitive financial information because his identity was stolen in 2001. However, when challenged with the fact that his tax return had been mailed directly to the 86th Road Bellerose property, petitioner stated that he started listing his mailing address as the Bellerose property after he was put on notice that he was under investigation for a violation of the residency requirement.

After reviewing the findings of the investigation, interviewing petitioner and reviewing the documents submitted on his behalf, Ms McNish concluded that petitioner had failed to establish that he was a bona fide New York City resident. In support of her conclusion, Ms. McNish found that the statements given by the Nassau County neighbors indicating that petitioner appeared to live exclusively

at the Nassau County house were more credible than the statement given by petitioner's tenant at the 86th Road property since the neighbors had no incentive to fabricate a story whereas the tenant may have been directed by petitioner, as a condition of the tenancy, to tell anyone who asked that petitioner lived there. Ms. McNish also found that the various documents which petitioner submitted, such as insurance cards and Verizon phone records, only showed that petitioner received mail at multiple locations and did not definitively establish residency in Bellerose. She noted that while a majority of the documents were addressed to the Bellerose property, many of them were dated after petitioner received notification that his residency was in question. Ms. McNish also found that petitioner's reasons for using a post office box were unconvincing and contradictory. Although petitioner claimed that he used the post office box because his identity was stolen in 2001, Ms. McNish noted that the submitted documents showed that he had used the box before 2001, and possibly as early as 1998. She concluded that while some of the documents addressed to petitioner at his post office box seemed to support his claim that he resided at the 86th Road address, they could also be viewed as attempts to conceal petitioner's's [sic] residency in Nassau County. She concluded that despite the fact that some of the documents, such as utility bills, were in petitioner's name, they could actually reflect use of the premises by the ground floor tenant.

Finally, Ms. McNish placed particular importance on the results of the surveillance conducted by HRA investigators which, she found, clearly demonstrated that petitioner lived with his wife and children in Nassau County. As already noted, on six of the nine dates of surveillance, petitioner was observed leaving the Nassau County residence prior to the start of the workday. Ms. McNish also found that petitioner's use of his wife's car to drive to the 86th Road address, where he then switched to his Buick for his drive to work demonstrated his intent to conceal his residence in Nassau County.

As a result of Ms. McNish's findings, HRA's Deputy General Counsel requested that petitioner be removed from his position with HRA. On September 13, 2005, the petitioner was discharged by HRA's Director of Employee Discipline.

Discussion

The standard of review in this article 78 proceeding is whether the decision to terminate petitioner was arbitrary and capricious, irrational or affected by an error of law. *See Matter of Scherbyn v. BOCES*, 77 NY2d 753, 757-78 (1991). Petitioner asserts that because he submitted numerous documents which indicate that he resides in Bellerose, the finding that he had violated the residency requirement was clearly irrational and should be overturned. The court disagrees. As discussed above, the documentation submitted by petitioner did not conclusively establish that petitioner's actual residence was in Bellerose. Moreover, the surveillance of petitioner by HRA investigators

demonstrated that petitioner not only frequently went to the Nassau County property, but frequently stayed overnight. Although petitioner offered the explanation that his wife had agreed to allow him to frequently visit his children at the Nassau County house and stay overnight it was not irrational for HRA to doubt this explanation given the fact that petitioner and his wife remained legally married, that they never even formally separated and that, in any event, such an arrangement would be highly unusual.

Nor was it irrational for the respondents to doubt petitioner's credibility with respect to his use of a post office box. For example, although petitioner claimed that he used a post office box for mail containing sensitive financial information after his identity was allegedly stolen in June, 2001, Ms. McNish found that 15 of the 37 documents reflecting the 86th Road address contained sensitive financial and/or personal information and were dated after petitioner's identity was allegedly stolen. Ms. McNish reasonably concluded that petitioner used a post office box initially and then changed his mailing address to the Bellerose property after being interviewed by HRA investigators in order to conceal his residence in Nassau County.

Under the circumstances, the petitioner has failed to show that respondents' determination was arbitrary and capricious, irrational or an abuse of discretion. The petition must therefore be denied.

Accordingly, the petition is denied and the proceeding is hereby dismissed.

The Clerk Shall Enter Judgment Herein

Dated: 6/29/06 MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION
[ ] NON-FINAL DISPOSITION